No. 45491-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Javier Espinoza,

Appellant.

Pierce County Superior Court Cause No. 12-1-01852-1

The Honorable Judge Ronald E. Culpepper

Appellant's Opening Brief

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Even certified dogs provide false positive alerts more than 50% of the time;

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25. The court erred by entering finding of fact 2.5. CP 512-513.

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Javier Espinoza drove from his home in California to Tacoma to meet briefly with Gerardo Hernandez. RP (7/9/13) 8. Hernandez owed Mr. Espinoza's mother and uncle money from the purchase of some real estate in Mexico. RP (7/9/13) 5; CP 342; Ex. 72. Because he was undocumented and unable to get a bank account, Hernandez paid in cash. RP (9/16/13) 87-88; CP 342. Mr. Espinoza rented a car and made the trip to retrieve the money from Hernandez, whom he had never met before. RP (7/9/13) 8-10; RP (9/10/13) 36; Ex. 25.

Mr. Espinoza did not know that the police had been investigating Hernandez and Guadalupe Cruz Camacho for suspected drug dealing for a long time. RP (9/10/13) 29, 34; RP (9/11/13) 5; RP (9/16/13) 68, 82, 92, 94. Law enforcement officers had previously conducted surveillance on the apartment where Mr. Espinoza met with Hernandez. RP (9/16/13) 68-69. The police had never seen Mr. Espinoza there before. *See* RP *generally*.

Mr. Espinoza arrived in Tacoma the day after another suspected drug dealer – Alfredo Flores – was arrested. RP (9/10/13) 36; RP (9/16/13) 66-68; Ex. 25. The police suspected that Hernandez and Cruz

Camacho knew of Flores's arrest so they again surveilled the apartment. RP (9/10/13) 28-30; RP (9/16/13) 67-68, 85.

The police saw several Hispanic men – none of whom they could identify – carrying items back and forth to Mr. Espinoza's rental car in the parking lot of the apartment complex. RP (9/10/13) 30. The officers were too far away to see what they were carrying. RP (9/10/13) 30.

Officer Betts walked his drug-sniffing dog, Barney, around the rental car. RP (9/11/13) 28-30. Barney alerted to the vehicle. RP (9/11/13) 28-30.

Shortly later, Mr. Espinoza, Hernandez, and Cruz Camacho all got into their separate cars and left. RP (9/16/13) 74-75. The police followed and stopped each car. RP (9/10/13) 31. At that time, Barney alerted to Cruz Camacho and Hernandez's cars as well. RP (9/11/13) 32-34.

Based on Barney's alerts, the "Hispanic subjects" who had moved items to and from the car, and Mr. Espinoza's presence at the apartment associated with the drug investigation, the police obtained a warrant to search Mr. Espinoza's rental car.[1] *See* Ex. 6.

No drugs were found in any of the cars to which Barney had signaled. RP (9/10/13) 38-42. In Mr. Espinoza's car, the police found

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[1] The warrant also permitted the search of the apartment and Hernandez and Cruz Camacho's cars. Ex. 6, pp 2-3. The facts in the affidavit that are only relevant to those premises are not included or at issue here.

that cash that Hernandez had paid him for the real estate sale.[2] RP (9/10/13) 36.

During a warrant search of the apartment, the police found large quantities of heroin and methamphetamine hidden in the walls and other places. RP (9/11/13) 9-12; RP (9/16/13) 31-41.

The police also found identification documents for Cruz Camacho in the apartment. RP (9/16/13) 41, 81-83; Ex 64A-E. There was nothing in the apartment related to Mr. Espinoza.

After his arrest, Mr. Espinoza admitted that he had been in the apartment earlier that day. RP (9/12/13) 36.

The state charged Hernandez, Cruz Camacho, and Mr. Espinoza with two counts of possession of drugs with intent to deliver. CP 1-2. The state also alleged school bus stop enhancements as well as the aggravating factor for a major violation of the controlled substances act. CP 1-2, 379-380.

Mr. Espinoza moved to suppress the physical evidence, arguing that Barney's alerts were too unreliable to provide probable cause supporting the search warrant. CP 171-266. He also argued that the dog sniff of his car comprised an unconstitutional warrantless search under the state constitution. CP 171-266.

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[2] The $42,000 in cash was wrapped in green cellophane. RP (9/10/13) 45; RP (9/16/13) 24.

Mr. Espinoza called two experts – a dog trainer and a chemist – in support of his suppression motion.[3] *See* Declaration of Maureen Goodman (filed 2/9/15), Supp. CP.

Barney's handler – Officer Betts – testified that Barney is trained to respond to marijuana, powder and crack cocaine, heroin and methamphetamine. RP (9/11/13) 21. Betts cannot determine which drug Barney is alerting to at any given time. RP (9/11/13) 21.

Betts also described that Barney is rewarded for giving an alert whether drugs are eventually found or not. RP (6/3/13) 31. Betts reasoned that, if no drugs are found, it is because the odor of drugs that have since been removed is still in the area. RP (6/3/13) 40. He said that the odor of drugs can linger for weeks. RP (9/11/13) 50.

Mr. Espinoza provided the court with information detailing how even certified drug-detecting dogs have extremely high rates of false positive alerts. CP 258-266.

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[3] A significant portion of the transcript for the suppression hearing – including almost all of the expert testimony -- was lost and deemed unrecoverable. Court's Decision from Court of Appeals (filed 9/25/14), Supp CP. The court of appeals ordered the trial court and the parties to reconstruct the record for appeal. Court's Decision from Court of Appeals (filed 9/25/14), Supp CP. The court and prosecutor provided their recollection of the testimony. Declaration of Maureen Goodman (filed 2/9/15), Supp. CP; Declaration of Ronald E. Culpepper (filed 3/30/15), Supp. CP. Mr. Espinoza's counsel indicated her memory was not clear enough to attempt to reconstruct the testimony. Affidavit of Lisa Mulligan (filed 11/14/14), Supp CP; Declaration of Counsel (filed 2/18/15), Supp CP.

The defense also pointed to information that trained narcotics dogs don't actually respond to the smell of drugs themselves. CP 185-237. Rather, they signal to the odors of chemicals that are found in numerous household items and bodily fluids as well as in illegal drugs. CP 185-237; Declaration of Maureen Goodman (filed 2/9/15), Supp. CP.

The trial court found that both experts were credible. RP (6/7/13) 5-6.[4] The judge said that many of the dog training expert's criticisms of Barney's training were valid. RP (6/7/13) 5. The court also credited the chemist's points about the dog's inability to discriminate between narcotics and legal substances. RP (6/7/13) 6. Still, the court denied Mr. Espinoza's motion to suppress because Barney met the Washington certification standards. RP (6/7/13) 7-9, 21.

Two months before trial, Mr. Espinoza moved to sever his trial from that of Hernandez and Cruz Camacho. RP (7/2/13); RP (7/9/13); RP (9/9/13) 51; CP 322-343. He provided a declaration from Hernandez saying that he would testify on Mr. Espinoza's behalf if the cases were severed. CP 342. Hernandez planned to detail the Mexican real estate transaction to explain that the cash in Mr. Espinoza's car was payment for

[4] The court does not appear to have entered written findings and conclusions regarding the suppression issue.

that transaction, rather than related to the drugs in the apartment. RP (7/9/13); CP 342.

When the court considered the motion, the trial judge noted his belief that Mr. Espinoza could call his mother to testify about the real estate sale. RP (7/9/13) 9-15. Mr. Espinoza responded that his mother was old and infirm and living in New Mexico where she was undergoing dialysis. RP (7/9/13) 22. He also explained that she would not have been able to explain the connection between the real estate transaction and the cash in Mr. Espinoza's car. RP (7/9/13) 12.

The court denied the motion to sever so Mr. Espinoza was not able to call Hernandez as a witness in his defense. RP (7/9/13) 17. The judge noted that Hernandez's proposed testimony did not seem credible and that Mr. Espinoza could always testify in his own defense. RP (7/9/13) 15, 17.

All Mr. Espinoza was able to present to the jury to explain his brief association with Hernandez was a document describing the real estate sale. Ex 72; CP 448-451. The document listed Mr. Espinoza's maternal uncle as the seller and Hernandez as the buyer. Ex 72. It said that payment must be made in full by a date a few days before Mr. Espinoza's arrest. Ex 72.

But Mr. Espinoza was not able to elicit that the seller listed on the document was his uncle. He was also not able to explain why Hernandez had paid for the real estate in cash.

Hernandez objected when Mr. Espinoza sought to show the jury that Hernandez was undocumented, to explain why he did not have a bank account in the United States and could not write a check. RP (9/16/13) 87. The court sustained Hernandez's objection. RP (9/16/13) 89.

In closing, the state attacked Mr. Espinoza's defense by arguing that it was not reasonable for Hernandez to pay for the real estate in cash. RP (9/18/13) 79. The prosecutor argued that the jury should not believe that the cash in the rental car was payment for real estate because there was no evidence linking it to the transaction in Mexico. RP (9/18/13) 79-80.

The jury convicted Mr. Espinoza of both counts of possession with intent to deliver and answered yes to the interrogatories regarding the school bus and major violation aggravators. RP (9/19/13) 2-5.

Before the sentencing hearing, Mr. Espinoza's attorney stipulated to the state's calculation of his offender score. CP 506-508. The stipulated score did not count the two possession offenses as the same criminal conduct. CP 506-508.

At sentencing, Mr. Espinoza asked the court to waive non-mandatory fines and fees because he did not have any financial resources. RP (10/18/13) 13. The court did not conduct any inquiry into his financial situation. RP (10/18/13). Still, the court ordered him to pay $5,800 in legal financial obligations. CP 513-514. The court found him indigent that same day. CP 531-532.

This timely appeal follows. CP 526.

ARGUMENT

I. THE COURT VIOLATED MR. ESPINOZA'S RIGHTS TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS BY DENYING HIS MOTION TO SEVER, WHICH IF GRANTED WOULD HAVE ALLOWED CODEFENDANT HERNANDEZ TO PROVIDE CRITICAL EXCULPATORY TESTIMONY.

Mr. Espinoza's entire defense was that he was in the wrong place at the wrong time. Far from being a co-actor in Hernandez and Cruz Camacho's drug trafficking scheme, Mr. Espinoza was only in the apartment on one occasion to pick up cash payment for some real estate that his family had sold to Hernandez in Mexico. RP (7/9/13); CP 342.

Hernandez was willing to testify to those facts on Mr. Espinoza's behalf – but only if he did not have to waive his Fifth Amendment privilege at his own trial in order to do so. RP (7/9/13); CP 342. Accordingly, Mr. Espinoza moved to sever his case from Hernandez's in order to permit the testimony.

By denying the motion and prohibiting him from offering the critical facts of his defense, the court violated Mr. Espinoza's rights to present a defense and to compulsory process.

A. The court violated Mr. Espinoza's constitutional rights by denying him the opportunity to present relevant, exculpatory evidence.

Due process guarantees the right to present witnesses in one's defense. U.S. Const. Amend. XIV; art. I, § 22; *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (*citing Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The constitutional guarantee of compulsory process is also a "fundamental right" that "the courts should safeguard with meticulous care." *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (internal citation omitted); U.S. Const. Amends. VI, XIV; art. I, § 22.[5]

[5] Mr. Espinoza repeatedly moved below to sever his case in order to permit him to call Hernandez as a defense witness. RP (7/2/13); RP (7/9/13); RP (9/9/13) 51; CP 322-343. Insofar as he did not raise this exact constitutional argument in the trial court, it presents manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

The right to present a defense includes the right to introduce relevant[6] and admissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Here, Hernandez's proposed testimony explaining the presence of the cash in Mr. Espinoza's car was highly relevant and necessary to Mr. Espinoza's defense. RP (7/9/13); CP 342. The real estate transaction between Hernandez and Mr. Espinoza's family was Mr. Espinoza's entire defense. See RP (9/18/13) 39-52. Indeed, it was the only reason why he was in Washington, at the apartment, or associating with the codefendants at all.

The large sum of cash in Mr. Espinoza's car, likewise, provided the only link between him and the drugs under the state's theory of the case. Mr. Espinoza had never been seen at the apartment before despite extensive police surveillance. Nothing belonging to Mr. Espinoza was found in the apartment.

The court opined that Mr. Espinoza could have called his mother as a witness to explain the Mexican real estate transaction. RP (7/9/13) 9-15. But she would not have been able to clarify why he was at the specific apartment in Tacoma, why he was paid in cash, or why the cash was

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[6] Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

packaged as it was. RP (7/9/13) 12. Only Hernandez – who had invited him to the residence, made the payment, and packaged the cash – could provide that evidence.

The real estate documents that Mr. Espinoza was able to rely upon at trial were, likewise, inadequate to present his defense. The documents listed only Mr. Espinoza's uncle's and Hernandez's names. Ex 72. Without foregoing his right to remain silent at trial, Mr. Espinoza was unable to establish any clear link between the transaction and himself. He was likewise unable to establish any clear link between the documents and the cash the police found in his car.

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720. No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Here, the state's interest in judicial economy through a joint trial is far from sufficient to overcome Mr. Espinoza's constitutional right to call necessary witnesses in his defense. *Id.*; *See also United States v. Seifert*, 648 F.2d 557, 564 (9th Cir. 1980).

Violations of rights to present a defense and to compulsory process require reversal unless the state can establish harmlessness beyond a

reasonable doubt. *Franklin*, 180 Wn.2d at 382; *Maupin*, 128 Wn.2d at 928.

Absent Hernandez's testimony, Mr. Espinoza was not able to reasonably present his defense to the jury. He was unable to explain that he was in Tacoma to pick up payment for some real estate his family had sold to Hernandez in Mexico. He was unable to rely on that transaction to clarify his presence in the apartment, his association with the codefendants, and the cash in his car. The state cannot demonstrate that the violation of Mr. Espinoza's rights to call witnesses on his behalf and to compulsory process was harmless beyond a reasonable doubt. *Id.*

The court violated Mr. Espinoza's rights to present a defense and to compulsory process by denying his motion to sever so Hernandez could testify in his defense. *Maupin*, 128 Wn.2d at 924; *Jones*, 168 Wn.2d at 720. Mr. Espinoza's convictions must be reversed. *Id.*

B. The court erred by denying Mr. Espinoza's motion to sever under the federal standard for severance in order to permit the testimony of a codefendant.

Constitutional considerations aside, the trial court abused its discretion by denying Mr. Espinoza's motion to sever so he could call Hernandez as a witness.

The standard for severance under the court rule in order to permit the testimony of a codefendant is an issue of first impression in

Washington. Federal courts, however, have established a two-step, eight-pronged analysis. *See e.g. United States v. Cobb*, 185 F.3d 1193, 1197 (11th Cir. 1999).

Under the federal rule, when an accused person moves to sever his/her case from that of a codefendant in order to call the codefendant as a witness, s/he must first demonstrate:

> (1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial.

Id.

Here, Mr. Espinoza established before the trial court that, (1), Hernandez's testimony was necessary for him to present his lawful explanation for the large sum of cash in his car and his presence in the apartment to the jury. RP (7/9/13) 12. As to (2), he informed the court of the basic substance of Hernandez's proposed testimony: that Hernandez met with Mr. Espinoza on the day of his arrest and paid him cash for the sale of a piece of real estate in Mexico. RP (7/9/13). Regarding (3), Hernandez's testimony, if believed, would have fully exculpated Mr. Espinoza. Finally, as to (4), Hernandez signed a declaration avowing that he would, indeed, testify on Mr. Espinoza's behalf in a severed trial. CP 342.

The federal case law further provides that, after the accused meets the four elements above, the court must still:

> (1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion.

Id. The court may not, however, consider the strength or weakness of the codefendant's potential testimony in considering the motion to sever. *Id.* at 1200.

Regarding these additional considerations, (1), Hernandez's testimony would have provided the entirety of Mr. Espinoza's theory of the case. It would have explained the real estate transaction, the cash in the car, and his brief association with the codefendants.

If believed, Hernandez's testimony would have proved Mr. Espinoza's innocence. The trial court denied the motion, however, based in part on its belief that Hernandez's testimony would not have been credible anyway. RP (7/9/13) 15. The court erred by considering its opinion of the strength of the evidence as part of the analysis. *Id.*

As to (2), without Hernandez as a witness, Mr. Espinoza was only able to demonstrate that there was a real estate transaction that may or may not have been connected to him in any way. Ex. 72. Without Hernandez's testimony connecting the real estate documents to his

presence in the apartment, Mr. Espinoza was unable to meaningfully present his defense to the jury.

Regarding (3), the evidence against Mr. Espinoza was much slimmer and less complicated than that detailing the extensive history of the investigation into Hernandez and Cruz Camacho. A separate trial for Mr. Espinoza would not have taken very long, especially as compared to the lengthy joint trial.

Finally, as to (4), Mr. Espinoza first moved to sever more than two months before trial began. CP 322; RP (7/2/13) 2-8. His motion was timely.[7]

Under the federal standard, the trial court abused its discretion by denying Mr. Espinoza's motion to sever in order to allow him to call Hernandez as a witness. *Cobb*, 185 F.3d at 1197.

The court abused its discretion by denying Mr. Espinoza's motion to sever to permit him to call Hernandez as a witness in his defense. *Id.* Mr. Espinoza's conviction must be reversed. *Id.*

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[7] CrR 4.4(a)(1) provides that a motion to sever is timely if it is brought at any time before trial. The motion can also be made at the close of evidence "if the interests of justice require."

C. The court erred by denying Mr. Espinoza's motion to sever under CrR 4.4(c)(2)(i).

In the alternative, if Mr. Espinoza cannot meet the federal standard for severance in order to permit a codefendant to testify on his behalf, the standard should be broadened under the Washington state severance rule.

As noted above, the standard for severance in order to allow the accused to call a codefendant as a witness is an issue of first impression in Washington.

Under the Washington court rule, a trial court must grant a pretrial motion to sever an accused person's case that of a codefendant whenever it is "appropriate to promote a fair determination of guilt or innocence of a defendant." CrR 4.4(c)(2)(i).

Under the federal rule, on the other hand, the court is only required to sever if "consolidation for trial appears to prejudice a defendant or the government." Fed. R. Crim. P. 14.

The plain language of the Washington rule focuses on fairness while that of the federal rule focuses only on prejudice. CrR 4.4(c)(2)(i); Fed. R. Crim. P. 14. Accordingly, severance to permit a codefendant's testimony should be required under CrR 4.4 whenever the evidence would be exculpatory and it has been demonstrated that the codefendant would actually testify at a separate trial.

Indeed, numerous other states have adopted a standard much broader than that established by federal precedent – requiring severance based only upon a showing that the codefendant would actually testify at a separate trial and that his/her testimony would be exculpatory. *See e.g. State v. Enright*, 303 Mont. 457, 16 P.3d 366 (2000) ("to establish prejudice the defendant must be prepared to show that the co-defendant will testify and that the testimony will actually be exculpatory"); *State v. DeRoxtro*, 327 N.J. Super. 212, 742 A.2d 1031 (App. Div. 2000) (" the key considerations are the exculpatory nature of the proffered testimony and a showing that it would be forthcoming in a separate trial"); *People v. Garnes*, 134 Misc. 2d 39, 510 N.Y.S.2d 409 (Sup. Ct. 1986) ("proper showing of need imports that movant clearly show to what codefendant would testify and that testimony would tend to exculpate movant"); *State v. Barkley*, 412 So. 2d 1380 (La. 1982) (denial of severance abuse of discretion when accused demonstrates that codefendant would testify at separate trial and that the evidence would be exculpatory).

CrR 4.4's focus on fairness guides toward an obligation that Washington courts sever from a codefendant's case based only upon a showing that the codefendant would testify at a separate trial and that the testimony would tend to be exculpatory.

Mr. Espinoza demonstrated below that Hernandez would have testified at a separate trial and that his testimony would have provided an exculpatory explanation for the state's only evidence against him – his presence in the apartment and the cash in his car. RP (7/9/13); CP 342. The court abused its discretion by denying Mr. Espinoza's motion to sever his case from that of Hernandez.

This court should adopt a broader standard for severance to permit the exculpatory testimony of a codefendant than the eight-pronged federal approach. This court should reverse Mr. Espinoza's convictions based on the court's erroneous denial of his motion to sever his case from that of Hernandez.

II. THE STATE PROVIDED INSUFFICIENT EVIDENCE TO CONVICT MR. ESPINOZA OF CONSTRUCTIVE DRUG POSSESSION.

The police did not find any drugs on Mr. Espinoza's person or in his rental car. The police had never seen him at the apartment before, despite their ongoing surveillance and familiarity with both Hernandez and Cruz Camacho. RP (9/10/13) 29, 34; RP (9/11/13) 5; RP (9/16/13) 68, 82, 92, 94; Ex. 6. pp. 7-8.

The police found identity documents for Cruz Camacho in the apartment, but nothing related to Mr. Espinoza. RP (9/16/13) 41, 81-83; Ex 64A-E. There was nothing else linking Mr. Espinoza to the apartment.

In fact, there was no evidence that Mr. Espinoza was anything but a one-time visitor to the apartment.

To prove that Mr. Espinoza had constructively possessed the drugs hidden in the apartment, the state was required to prove that he exercised dominion and control over them. The evidence of Mr. Espinoza's brief visit to the apartment was insufficient to establish dominion and control.

Indeed, without Mr. Espinoza's statement to police, there was no evidence at trial that he had ever entered the apartment where the drugs were found. Accordingly, there was also insufficient independent evidence to convict him under the rule of *corpus delicti*.

1. No rational jury could have found beyond a reasonable doubt that Mr. Espinoza's brief, one-time presence in the apartment demonstrated dominion and control over the drugs hidden inside.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

Drug possession can be either actual or constructive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Actual possession requires proof that the accused had the contraband in his/her "actual physical

custody." *Id.* Constructive possession requires proof of "dominion and control" over a substance. *Id.*

The police did not find any drugs in Mr. Espinoza's physical custody. The only drugs were those concealed in the walls and other locations in the apartment. RP (9/11/13) 9-12; RP (9/16/13) 31-41. Accordingly, in order to convict Mr. Espinoza, the state was required to prove that he had dominion and control over the drugs hidden in the apartment.

But mere proximity to contraband insufficient to demonstrate dominion and control. *Chouinard*, 169 Wn. App. at 899. This is true even if the accused knows that the contraband is there. *Id.*

Rather, the state must present some evidence, at the very least, of dominion and control over the premises where the contraband is found. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996) (dominion and control over the premises creates a rebuttable presumption of dominion and control of contraband found inside).

Here, the state did not present any evidence that Mr. Espinoza had dominion and control over either the apartment or the drugs found inside.

At most, the evidence demonstrated that Mr. Espinoza was inside the apartment on one occasion.[8]

Despite ongoing surveillance, no officer had ever seen Mr. Espinoza or his car at the apartment before. While the officers found identity documents for Cruz Camacho inside the apartment, the search did not turn up anything linking Mr. Espinoza to the premises. RP (9/16/13) 41, 81-83; Ex 64A-E (re Cruz). The state did not clarify whose name was listed on the lease or utility bills for the apartment.

The state did not present any evidence that Mr. Espinoza had dominion and control over the drugs or the apartment in which they were found. No rational jury could have found that he constructively possessed the drugs beyond a reasonable doubt. *Chouinard*, 169 Wn. App. at 899. Mr. Espinoza's convictions must be reversed and the charges dismissed with prejudice. *Id.* at 903.

2. The evidence was insufficient to convict Mr. Espinoza under the rule of *corpus delicti*.

    a. The state failed to produce independent evidence that Mr. Espinoza had ever been in the apartment where the drugs were found.

Mr. Espinoza told the police that he had entered the apartment where the drugs were found. RP (9/12/13) 36. The state did not present

[8] As argued below, Mr. Espinoza's admission to being inside the apartment is also insufficient to support his conviction under the rule of *corpus delicti*.

any other evidence that he had ever been inside.[9] Accordingly, Mr. Espinoza's conviction for possession of the drugs in the apartment must be reversed under the rule of *corpus delicti* for lack of independent evidence of constructive possession.

The *corpus delicti* rule precludes conviction based solely on the accused's confession.[10] *Dow*, 168 Wn.2d at 249. The state must present *prima facie* evidence of each element of a charged offense with evidence independent of the confession. *Id.* at 254. If the state fails to provide corroborating evidence for each element, the conviction must be reversed for insufficient evidence. *Id.*

Here, the state did not provide any independent evidence that Mr. Espinoza possessed the drugs in the apartment. Once his statement that he had entered the apartment is removed from consideration under the rule of *corpus delicti*, there is no evidence associating Mr. Espinoza with either the drugs or the apartment in which they were found.

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[9] Officer Smith testified that he saw three cars, including Mr. Espinoza's rental car, leave the parking lot of the apartment complex at the same time. RP (9/16/13) 74-75. Smith did not say where the people who entered the cars had come from. RP (9/16/13) 74-75. There were at least eight other apartments in the complex, including one that shared a doorway area with the apartment associated with Hernandez and Cruz Camacho. RP (9/11/13) 58.

[10] If the state does not provide independent evidence to corroborate each element of a charged crime under the rule of *corpus delicti*, the evidence is insufficient to convict. *Dow*, 168 Wn.2d at 254. Issues regarding the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998). The admissibility of the accused's statement under the *corpus delicti* rule is a mixed question of law and fact, reviewed *de novo*. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

In order to prove that Mr. Espinoza constructively possessed the drugs in the apartment, the state was required to demonstrate that he exercised dominion and control over them. *Cote*, 123 Wn. App. at 549. Without any other connection between Mr. Espinoza and the apartment or evidence that he ever handled the drugs, dominion and control required, at the very least, evidence that he had been inside the apartment at some point.[11] Absent Mr. Espinoza's statement, there was no independent evidence of the element of possession.

The state presented insufficient evidence to convict Mr. Espinoza under the rule of *corpus delicti*. *Dow*, 168 Wn.2d at 249. Mr. Espinoza's convictions must be reversed and the charges dismissed with prejudice. *Id.*

b. If Mr. Espinoza's claim of insufficiency under the rule of *corpus delicti* is not preserved, then he received ineffective assistance of counsel.

As outlined above, the state failed to prove the *corpus delicti* of constructive possession. A successful *corpus delicti* challenge would have resulted in dismissal of the charge. *Dow*, 168 Wn.2d at 255.

Failure to validly raise that the evidence is insufficient under the rule of *corpus delicti* constitutes ineffective assistance of counsel. *State v.*

[11] As argued above, Mr. Espinoza's mere presence in the apartment was actually insufficient to prove dominion and control. For purposes of this argument, however, the state was required to prove *at least* that he had been present inside the apartment to corroborate his statement under the rule of *corpus delicti*.

C.D.W., 76 Wn. App. 761, 764-65, 887 P.2d 911 (1995). There is a reasonable probability that the error affected the outcome of Mr. Espinoza's trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). No reasonable strategy could justify counsel's failure to raise the issue.

If the *corpus delicti* issue may not be raised for the first time on review, Mr. Espinoza was deprived of the effective assistance of counsel. *C.D.W.*, 76 Wn. App. at 764-65; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). His convictions must be reversed and the case remanded for a new trial. *Id.*

III. DRUG DOG ALERTS ARE TOO UNRELIABLE AND ATTENUATED TO PROVIDE THE PROBABLE CAUSE NECESSARY TO THE WARRANT TO SEARCH MR. ESPINOZA'S CAR.

The warrant to search Mr. Espinoza's car was based almost exclusively on Barney's alert. But research shows that drug dogs like Barney give false positive alerts up to 85% of the time.[12] Drug dogs are most likely to give false positive responses in cases involving Hispanic men, presumably due to handler bias.[13] Drug dogs also regularly alert to

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[12] *See* Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes,* 14 Animal Cognition 387 (2011).

[13] *See* Dan Hinkel, et al., *Tribune analysis: Drug- sniffing dogs in traffic stops often wrong – high number of fruitless searches of Hispanics' vehicles cites as evidence of bias*, Chicago Tribune, Jan 6, 2011.

non-contraband items containing the same chemicals as drugs.[14] In fact, Barney was trained to respond to marijuana – which is no longer indicative of criminal activity -- in the same way as heroin and methamphetamine.[15] Finally, drug dogs alert to residual odors and trace scents that are the equivalent of "stale" evidence.[16]

Barney's alert to the cars in Mr. Espinoza's case did not provide the "reasonably trustworthy" information necessary to establish probable cause. Once the drug dog evidence is excised, the warrant affidavit in Mr. Espinoza's case in insufficient to justify the search of his car.

A search warrant may be issued only if it is supported by probable cause.[17] *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012); U.S. Const. Amend. IV; art. I, § 7.

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[14] Michael Macias, et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab 16 (2008); Florence Negre, et al., *Regulation of Methylbenzoate Emissions After Pollination in Snapdragon and Petunia Flowers*, 5 Plant Cell 2992 (2003); P. Aggarwal, et al., *The Use of Thermogravimetry to Follow the Rate of Evaporation of an Ingredient Used in Perfume*, 49 J. of Thermal Analysis 595 (1997); Michael Macias, *The Development of an Optimized System of Narcotic and Explosive Contraband Mimics for Calibration and Training of Biological Detectors*, 104 (May 27, 2009) (Floridal Int'l Univ. Electronic Theses and Dissertations, paper 123); Declaration of Maureen Goodman (filed 2/9/15), Supp. CP.

[15] RP (9/11/13) 21.

[16] *See* Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 5 (2006); U.S. Dept. of Army, Military Working Dog Program 30 (Pamphlet 190–12, 1993).

[17] The determination of whether the information in a warrant affidavit provides probable cause is a question of law reviewed *de novo*. *State v. Ollivier*, 178 Wn.2d 813, 848, 312 P.3d 1 (2013) *cert. denied,* 135 S.Ct. 72, 190 L.Ed.2d 65 (2014).

Probable cause must be based on "reasonably trustworthy information." *State v. Afana*, 169 Wn.2d 169, 182, 233 P.3d 879 (2010); *see also Lyons*, 174 Wn.2d at 359 (describing test for determining whether an informant's tip is reliable enough to provide probable cause).

Because they are incapable of providing reasonably trustworthy information, drug dog alerts cannot provide establish cause to believe that drugs are actually present in a given location.[18]

A. Drug dogs provide too many false positive alerts for their signals to be considered reasonably trustworthy information.

Even well-trained, experienced drug-sniffing dogs provide so many false positive responses that their signals cannot be considered trustworthy information.

In one study, the researchers had eighteen certified police dogs do 144 runs through rooms in search of drugs and explosives. Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes,* 14 Animal Cognition 387 (2011)[19]. There was no actual contraband in any of the rooms. Even

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[18] The question of whether drug dog alerts, in general, are too unreliable to provide probable cause is one of first impression under art. I, § 7.

Under the Fourth Amendment, the U.S. Supreme Court has addressed the similar but distinct issue of whether the prosecution bears the burden of proving that each individual dog's training records demonstrate reliability. *See Florida v. Harris*, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013). The *Harris* court did not address the issue raised herein: whether drug dog alerts are categorically unreliable, regardless of a specific dog's training records.

[19] *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3078300.

so, the dogs positively alerted at least once in 123 of the 144 runs – a false positive rate of 85%. *Id.*

Notably, the study included both hidden decoys to tempt the dogs (such as sausages and toys) and false paper markers, which the handlers were told indicated the presence of contraband. *Id.* The markers that led the handlers to believe contraband existed were by far the greatest cause of the false responses. *Id.* In short, a certified and experienced handler who believes that drugs are hidden in a given location has a greater effect on a dog's signal even than hidden sausages.

When circumstances exist such that the handler believes s/he will find drugs and the dog is tempted, the dog will resist alerting in only 21 out of 144 runs through rooms with no contraband. *Id.*

The results outlined above go a long way toward explaining the results of another study conducted by the Chicago Tribune. In an analysis of three years of data from suburban police departments, that study found that only 44% of positive roadside alerts from drug dogs led to the actual discovery of drugs or paraphernalia in the car to which the dog alerted. Dan Hinkel, et al., *Tribune analysis: Drug- sniffing dogs in traffic stops often wrong – high number of fruitless searches of Hispanics' vehicles*

cites as evidence of bias, Chicago Tribune, Jan 6, 2011[20]. In the case of Hispanic drivers, however, the success rate went down to only 27%. *Id.*

Because they provide such a high rate of false positive alerts, even certified drug dogs are not capable of providing the "reasonably trustworthy information" necessary to establish probable cause. *Afana*, 169 Wn.2d at 182.

B. Drug dogs alert to too many legal substances for their signals to be considered reasonably trustworthy evidence of a crime.

A piece of information cannot provide probable cause if it is equally consistent with both lawful and unlawful conduct. *State v. Neth*, 165 Wn.2d 177, 185, 196 P.3d 658 (2008).

Barney, along with many other police dogs in Washington, was trained to alert to the smell of marijuana in the same way as the odors of cocaine, heroin, and methamphetamine. RP (9/11/13) 21. But the presence of the odor of marijuana is no longer evidence of a crime in Washington. *See* RCW 69.50.325, et seq. Even if a dog never gave a false alert, it is still impossible for the handler to differentiate a signal to marijuana from an illegal substance.

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[20] *Available at:* http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog.

Accordingly, even an alert from an infallible drug dog cannot establish probable cause because it could be evidence of only lawful activity.

Further complicating this issue, dogs alerting to cocaine and heroin are actually responding to the odors of volatile compounds the drugs emit – not the drugs themselves. *See* Norma Lorenzo, et al., *Laboratory and field experiments used to identify canis lupus var. familiaris active odor signature chemicals from drugs, explosives, and humans*, 376 Analytical and Bioanalytical Chemistry 1212, 1213 (2003). Those volatile compounds, however, are also present in common, legal household items and human bodily fluids.

Neither the dog, the handler, nor a reviewing court has any way of differentiating an alert to cocaine or heroin from one to snapdragons, petunias, perfume, vinegar, vaginal secretions, or seminal fluid.

In the case of cocaine, drug-detecting dogs signal to the odor of methyl benzoate. Michael Macias, et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab 16 (2008)[21]; Lorenzo, at 1213. But methyl benzoate is also emitted by snapdragon and petunia flowers as an

[21] *Available at:* http://www.pawsoflife.org/Library/Detection/Marcias.pdf

attractant for pollinating insects.[22] *See* Florence Negre, et al., *Regulation of Methylbenzoate Emissions After Pollination in Snapdragon and Petunia Flowers*, 5 Plant Cell 2992 (2003).[23] Methyl benzoate is also a common ingredient in perfumes. P. Aggarwal, et al., *The Use of Thermogravimetry to Follow the Rate of Evaporation of an Ingredient Used in Perfume*, 49 J. of Thermal Analysis 595 (1997); *See also Horton v. Good Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982) (civil rights case in which drug dog falsely alerted to a schoolchild who had a small bottle of perfume in her purse); *Jacobsen v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 534-35 (Minn. 2007) (Hanson, J., concurring) ("methyl benzoate is a common chemical used in multiple consumer products – solvents, insecticides, perfumes, etc.").

In the case of heroin, drug-sniffing dogs alert to the odor of acetic acid. Michael Macias, *The Development of an Optimized System of Narcotic and Explosive Contraband Mimics for Calibration and Training*

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[22] A drug-sniffing dog is conservatively capable of detecting 10 micrograms of methyl benzoate in the air. Kenneth G. Furton, et al., *Field and Laboratory Comparison of the Sensitivity and Reliability of Cocaine Detection on Currency Using Chemical Sensors, Humans, K-9s, and SPME/GC/MS/MS Analysis*, *in* Investigation and Forensic Science Technologies 41 (Kathleen Higgins ed., 1998). A single snapdragon flower emits 56.5 micrograms of methyl benzoate over the course of 24 hours. Natalia Dudereva, et al., *Developmental Regulation of Methyl Benzoate Biosynthesis and Emission in Snapdragon Flowers*, 12 Plant Cell 949 (2000). Accordingly, a bouquet or garden bed of twenty flowers emits 1130 micrograms in a day, for an average of 47.1 micrograms per hour. A vase or garden full of snapdragons would produce more than enough methyl benzoate to cause even a flawlessly-trained drug dog to alert.

[23] *Available at:* http://www.plantcell.org/content/15/12/2992.full.

of Biological Detectors, 104 (May 27, 2009) (Floridal Int'l Univ. Electronic Theses and Dissertations, paper 123)[24]. But acetic acid is also a primary component of vinegar. *Id.* at 104-109 (breaking down the concentrations of acetic acid in various household vinegars).

Perhaps more critical to the privacy analysis, acetic acid is also present in women's vaginal secretions, human sweat, and seminal fluid. Declaration of Maureen Goodman (filed 2/9/15), Supp. CP.

Because drug-sniffing dogs actually alert to the odors of chemicals that are also present in common household items and bodily fluids, the information they provide is equally consistent with lawful and unlawful activity. As such, the information cannot provide probable cause to believe that a crime has taken place. *Neth*, 165 Wn.2d at 185.

C. Drug dogs alert to odors that are either too "stale" or too attenuated to establish probable cause that drugs are actually present in the area alerted.

"Stale" evidence cannot provide probable cause to believe that evidence of a crime will be found in a specific place at the time a warrant is issued. *Lyons*, 174 Wn.2d at 361. Vague, un-dated observations, for example, cannot support a search unless the warrant affidavit provides the date that the observations were made. *Id.*

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[24] *Available at:* http://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=1158&context=etd.

Drug dogs may alert to areas in which drugs were kept at some point in the past but are no longer present. Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 5 (2006). Indeed, this phenomenon of "residual odors" is commonly employed to explain the high number of drug dog alerts to areas in which no drugs are found. *See e.g.* U.S. Dept. of Army, Military Working Dog Program 30 (Pamphlet 190–12, 1993)[25] ("The odor of a substance may be present in enough concentration to cause the dog to respond even after the substance has been removed. Therefore, when a detector dog responds and no drug or explosive is found, do not assume the dog has made an error").

In Mr. Espinoza's case, Officer Betts acknowledged that he considers Barney's alerts in the field as successes even if no drugs are found. RP (6/3/13) 31. This is because he assumes that Barney is responding to the residual odor of drugs that were there in the past. RP (6/3/13) 40. He said that such odors can linger for weeks. RP (9/11/13) 50.

Particulate drug contamination is also easily transferred from one surface to another. Nat'l Inst. Of Justice, U.S. Dep't of Justice Guide for the Selection of Drug Detectors for Law Enforcement Applications: NIJ

[25] *Available at*: http://armypubs.army.mil/epubs/pdf/p190_12.pdf.

Guide 601-00, at 6 (2000)[26]. This means "a person who has handled cocaine will transfer cocaine particles to anything else he or she touches, including skin, clothing, door handles, furniture, and personal belongings." *Id.*

Likewise, a drug dog could alert to the clothing of someone who was at a party where other people were using drugs. Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. at 4. The issue of residual and transferred drug odors can be especially problematic in the case of rental cars – such as the one Mr. Espinoza was driving. *Id.* at 5, n. 20.

To justify a search, a warrant affidavit must establish a nexus between the crime, the evidence sought, and the place to be searched. *Neth*, 165 Wn.2d at 182-83.

Evidence that someone who had once handled drugs later touched or sat in a car would be far too remote to provide probable cause to search that car. But a drug dog's positive alert to a car could be providing only that much information. A dog sniff is too attenuated to provide probable cause to believe that drugs will be found in the car. *Id.*

Because a dog alert may be a response to a mere residual odor or to particulate contamination transferred from someone who had previously

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[26] *Available at:* https://www.ncjrs.gov/pdffiles1/nij/183260.pdf.

handled drugs, the magistrate has no way of knowing whether the evidence it provides is stale or too remote to provide probable cause. *Id.*; *Lyons*, 174 Wn.2d at 361.

D. If the unreliable dog-sniff evidence is excised, the warrant affidavit does not provide probable cause to support the search of Mr. Espinoza's rental car.

Once the evidence gained from the dog alert to Mr. Espinoza's rental car is excised from the warrant affidavit, the remaining information is insufficient to establish probable cause.

A magistrate may issue a search warrant only if the affidavit establishes probable cause that the accused is involved in criminal activity and that evidence of the crime will be found in the place to be searched. *Neth*, 165 Wn.2d at 182. The affidavit must be based on more than mere suspicion or personal belief. *Id.* Probable cause requires a nexus between the criminal activity, the item to be seized, and the place to be searched. *Id.* at 182-83.

Absent the dog-sniff evidence, the only information in the warrant affidavit about Mr. Espinoza or his rental car was:

> That it was parked on one day in the parking lot of an apartment complex, which included an apartment that was part of an ongoing drug investigation. Ex. 6, p. 7.
> That 4-5 unidentified "Hispanic subjects" had moved packages into the car. Ex. 6, p. 8.

> That someone left the apartment at the same time as several other people, got into the car, and drove away. Ex. 6, p. 8.

This remaining evidence is insufficient to provide probable cause to support the warrant to search Mr. Espinoza's rental car.

First, the fact that the car was parked near the apartment and that Mr. Espinoza left the apartment and got into the car was not evidence of a crime or of a nexus between any drug dealing and the car. Although the apartment was part of an ongoing investigation, no drugs had yet been recovered.[27]

More importantly, there was no evidence linking Mr. Espinoza to the alleged drug dealing. *See* Ex. 6, pp. 7-8. Unlike Hernandez and Cruz Camacho, the police had never seen Mr. Espinoza or his car at the apartment before and no source had ever linked him with any drugs. *See* Ex. 6, pp. 7-8. Mr. Espinoza's mere presence at the apartment on one evening was far from sufficient to link him or his car to any criminal activity.

The police observations of unidentified "Hispanic subjects" putting packages into the car was also inadequate to establish probable cause. The court noted that it was unusual to put packages into the engine compartment of a car but even "unusual," "odd," or "suspicious" evidence

[27] Indeed, the same drug dog sniffs used to justify the search of Mr. Espinoza's rental car were also used to justify the search of the apartment. Ex. 6.

does not establish probable cause if it is also consistent with legal activity.[28] *Neth*, 165 Wn.2d at 184.

In *Neth*, the accused's possession of numerous plastic baggies and a several thousand dollars in cash (along with internal inconsistencies in his story and inconsistencies between his story and that of the passenger in his car) was insufficient to support a search warrant. *Id.*

Similarly, here, while perhaps odd, the alleged storage of packages in the engine compartment of a car is not evidence of a crime. Indeed, the surveilling officers were too far away to see if the "Hispanic subjects" included either Hernandez or Cruz Camacho (both of whom the officers knew well). Ex. 6, p. 8. The "subjects" could actually have been moving car parts that resembled "packages" into the engine compartment.

Because the remaining evidence relevant to Mr. Espinoza's rental car in the warrant affidavit does not establish a nexus between any drugs and the car and is consistent with lawful as well as with illegal activity, it does not establish probable cause to search the car. *Neth*, 165 Wn.2d at 182, 184.

Absent the unreliable dog-sniff evidence, the warrant affidavit was inadequate to support the search of Mr. Espinoza's car. *Neth*, 165 Wn.2d

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[28] Notably, when the police searched Mr. Espinoza's rental car, they did not find any drugs in any area, including the engine compartment. RP (9/10/13) 38-42.

at 182. Mr. Espinoza's convictions must be reversed and his case remanded with instructions to suppress the evidence found in his car. *Id.* at 186.

IV. THE DOG SNIFF OF MR. ESPINOZA'S RENTAL CAR CONSTITUTED AN UNLAWFUL WARRANTLESS SEARCH UNDER ART. I, § 7.

Even if it is considered reliable, Barney's sniff of Mr. Espinoza's car revealed information to the officers that was not available to the general public and would not have been accessible absent his sense-enhancing capabilities. Accordingly, the sniff was a search under the state constitution.

Because the officers did not have "authority of law" to search Mr. Espinoza's car as it sat in the apartment complex parking lot, the warrantless dog sniff violated his rights under art. I, § 7. Without Barney's alert, the warrant to search Mr. Espinoza's car was not supported by probable cause.

The drug dog sniff of Mr. Espinoza's rental car constituted an unlawful, warrantless search under the state constitution.[29]

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[29] The Washington Supreme Court has twice accepted review in order to resolve whether a drug dog sniff constitutes a search under art. I, § 7 but has determined both times that those cases were better decided on other bases. *See Neth*, 165 Wn.2d at 181("This case is before us because the question of whether a dog sniff amounts to a search under article I, section 7 of the Washington Constitution has not yet been answered. We took this case as a companion case to *State v. Buelna Valdez,* No. 80091–0 (Wash. argued June 10, 2008), to resolve that issue. But inasmuch as the trial court ruled that the magistrate should not have issued the warrant based on the dog sniff because of inadequate foundation that the

Art. I, § 7 of the state constitution provides more extensive protection of the right to privacy than the Fourth Amendment. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). The state constitution guards against any police action constituting "a disturbance of one's private affairs." *Id.* If state action disturbs a citizen's private affairs, it may only be undertaken with "authority of law," such as a valid search warrant. *Id.*

Here, the warrantless dog sniff of Mr. Espinoza's car constituted an impermissible search because it disturbed his private affairs without the authority of law. *Id.*

Art. I, § 7 provides greater protection for cars and their contents than the Fourth Amendment. *See State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012) (unlike the Fourth Amendment, art. I, § 7 does not permit an "automobile exception" for warrantless searches of cars even when there is probable cause to believe that evidence of a crime will be found inside); *See also State v. Grande*, 164 Wn.2d 135, 146, 187 P.3d 248 (2008) ("The protections of art. I, § 7 do not fade away or disappear within the confines of an automobile).

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dog was reliable, we conclude that the dog sniff is not before us"); *Valdez*, 167 Wn.2d at 768 (deciding the case on grounds that the police conducted an unlawful search incident to arrest before the canine arrived).

Even under the Fourth Amendment, governmental action constitutes a search when it employs a device that is not in public use to gain information that "would previously have been unknowable without physical intrusion." *Kyllo v. United States*, 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *See also United States v. Jones*, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

Under art. I, § 7, a drug dog sniff of a home constitutes a search requiring a warrant. *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998).

The *Dearman* court relied heavily on the similarity between a drug dog who allows the officers to "see through the walls of a home" and thermal imaging devices like the one used in *Kyllo*. *Id.* at 635. Police conducted a search because they would not have otherwise been able to obtain the information the dog provided without physically entering the garage.[30] *Id.*

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[30] The United States Supreme Court recently held that a dog sniff of the front porch of a home constituted an unlawful warrantless search, relying primarily on principles of property and trespass law and the special status of the home under the Fourth Amendment. *Florida v. Jardines*, 133 S.Ct. 1409, 1415, 185 L.Ed.2d 495 (2013).

The concurrence in that plurality opinion, however, would have based the decision on the drug-sniffing dog's status as a "specialized device for discovering objects not in plain view (or plain smell)." *Jardines*, 133 S.Ct. at 1418 (Kagan, J. concurring). Had that reasoning represented the most narrow holding of the split decision, then dog sniffs of cars would, presumably, constitute searches under the Fourth Amendment as well as under art. I, § 7. *See e.g. Jones*, 132 S.Ct. 945 (applying the *Kyllo* rule to the use of sense-enhancing devices in vehicles as well as residences).

Generally, under art. I, § 7, this logic applies to vehicles as well as to homes. *See e.g. State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003) (police conducted a search by installing a GPS device on an impounded car). Accordingly, the holding and logic of *Dearman* should prohibit warrantless dog sniffs of cars as well as residences.

Still, Division I has held that a drug dog sniff of a car does not constitute a search under the state constitution if the dog smells from an area where the accused does not have an expectation of privacy. *See State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010). The *Hartzell* court does not mention its prior, contradictory holding in *Dearman*, or consider the implications of the fact that dogs have forty times as many olfactory sensors as humans. *Id*; Mark Derr. "With Dog Detectives, Mistakes Can Happen." NY Times. 12/24/02.

Instead, the cursory analysis in *Hartzell* relies on the rule that police do not perform a search by detecting something "using one or more of his senses from a nonintrusive vantage point." *Hartzell*, 156 Wn. App. at 929. But an officer does not use "*his* senses" when he employs a drug-detecting dog. *Hartzell* was wrongly decided and should not be followed by this court.

Under the Fourth Amendment, drug-detecting dog sniffs (of anything other than a home) are considered *sui generis* because they *only*

reveal drugs and citizens do not have any legitimate privacy interest in contraband. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S.Ct. 834, 837, 160 L.Ed.2d 842 (2005).

As outlined above, however, this logic is deeply flawed. First, the high rate of false positive alerts even by certified police dogs belies any notion that a dog alert is certain evidence of the presence of drugs.[31] Indeed, the police did not find any drugs in any of the three vehicles to which Barney positively alerted in Mr. Espinoza's case. RP (9/10/13) 38-42.

Also detailed above, drug dogs to not actually signal to the presence of drugs. Rather, they provide an alert when they smell volatile compounds that are emitted by drugs but are also given off by common, legal, household items and bodily fluids.

Finally, many dogs (including Barney) are trained to alert to marijuana in the same way as cocaine, heroin, and methamphetamine. RP (9/11/13) 21. The presence of marijuana is no longer evidence of a crime in Washington. *See* RCW 69.50.325, et seq.

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[31] The *Caballes* court noted that the accused raised the frequency of false positives from drug-detecting dogs as an issue but dismissed the concern because it was not supported by the record in that case. *Caballes*, 543 U.S. at 409. Here, on the other hand, the reliability issues with drug-sniffing dogs is well-documented in the record below and on appeal. *See* CP 171-266.

In short, a drug dog's signal is far from conclusive evidence that contraband is actually present.[32] The *sui generis* justification for warrantless drug dog searches under the Fourth Amendment is fallacious and should not be adopted under art. I, § 7.

More importantly, however, the *sui generis* exception to the warrant requirement has never been recognized under art. I, § 7 and is incompatible with the state constitution's heightened privacy protections. *See e.g. Snapp*, 174 Wn.2d at 194 ("As we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law"); *Afana*, 169 Wn.2d at 180 ("…article I, section 7 of our state constitution 'clearly recognizes an individual's right to privacy with

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[32] These flaws in the majority's analysis in *Caballes* were emphasized by Justice Souter in his dissent:

> What we have learned about the fallibility of dogs in the years since *Place* was decided would itself be reason to call for reconsidering *Place's* decision against treating the intentional use of a trained dog as a search…
>
> The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Caballes, 543 U.S. at 410-12 (Souter, J. Dissenting) (internal citations omitted).

no express limitations'"); *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007)*("*In contrast to the Fourth Amendment to the United States Constitution, the article I, section 7 provision 'recognizes a person's right to privacy with no express limitations'").

If information in a warrant affidavit was obtained pursuant to an unconstitutional search, that information may not be used to support the warrant. *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008).

Because the drug-detecting dog constitutes a sense-enhancing technology employed to invade Mr. Espinoza's private affairs without the authority of law, the dog's alert to the rental car must be excised from the search warrant affidavit. *Id.*; *Dearman*, 92 Wn. App. at 635.

As discussed above, the only remaining relevant information in the affidavit -- the fact that the car and Mr. Espinoza were present at the apartment and the four to five "Hispanic subjects" putting packages into the car – is insufficient to establish probable cause to search. *Neth*, 165 Wn.2d at 182.

The police conducted an unlawful warrantless search of Mr. Espinoza's car by exposing it to a drug-sniffing dog. Absent the evidence resulting from that unlawful search, the warrant affidavit is inadequate to establish probable cause to search Mr. Espinoza's rental car. *Eisfeldt*, 163

Wn.2d at 640. Mr. Espinoza's case must be reversed and remanded with instructions to suppress the evidence seized from his vehicle. *Id.*

V. MR. ESPINOZA'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE THAT HIS TWO POSSESSION CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.

Mr. Espinoza's two simultaneous possession convictions should have been counted as the same criminal conduct for sentencing purposes. Instead of bringing that to the court's attention, however, his attorney stipulated to the state's calculation of his offender score, which scored them separately.

Mr. Espinoza's attorney provided ineffective assistance of counsel by stipulating to an improperly-calculated offender score.

The right to counsel includes the right to the effective assistance of counsel.[33] U.S. Const. Amends. VI, XIV; *Strickland*, 466 U.S. at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

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[33] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *Horton*, 136 Wn. App. 29. Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland* 466 U.S. at 687).

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Defense counsel provides ineffective assistance by failing to validly raise that two offenses comprise the same criminal conduct for sentencing purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a). Two current offenses are not scored against one another if they constitute the same criminal conduct:

> … If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime… "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim…

RCW 9.94A.589(1)(a).

Two simultaneous offenses for possession of two or more different drugs encompass the same criminal conduct for sentencing purposes. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994).

Accordingly, Mr. Espinoza's two convictions for simultaneous possession of two different drugs in the apartment would have been scored as the same criminal conduct if defense counsel had raised it. *Id.*

Instead, however, Mr. Espinoza's attorney stipulated to the state's calculation of his offender score, which counted each of his convictions against the other. CP 506-508. A reasonable attorney would have recognized that precedent clearly dictated that the two offenses comprised the same criminal conduct. *Kyllo*, 166 Wn.2d at 862. Defense counsel provided deficient performance. *Id.*

Mr. Espinoza was prejudiced by his attorney's deficient performance. *Id.* Though the court gave him an exceptional sentence, it was significantly lower than that of the Hernandez who had a higher offender score. RP (10/18/13) 7-19. Accordingly, the court appears to have considered the standard sentencing range in determining the length of Mr. Espinoza's exceptional sentence. There is a reasonable probability that defense counsel's stipulation to an improperly calculated offender score affected the outcome of the proceeding. *Id.*

Mr. Espinoza's defense attorney provided ineffective assistance by stipulating to an improperly-calculated offender score. *Phuong*, 174 Wn. App. at 548. Mr. Espinoza's case must be remanded for resentencing. *Id.*

VI. THE TRIAL COURT ERRED BY ORDERING MR. ESPINOZA TO PAY $5,800 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY.

Mr. Espinoza was found indigent at the end of trial. CP 531-532. Still, the court ordered him to pay $5,800 in legal financial obligations (LFOs), over his objection. CP 513-514; RP (10/18/13) 13.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 512-513. But the court did not conduct any particularized inquiry into Mr. Espinoza's financial situation at sentencing or at any other time. RP (10/18/13). The court erred by ordering Mr. Espinoza to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Espinoza's ability to pay LFOs. RP (10/18/13). The court did not consider his financial status in any way. Indeed, the court also found Mr. Espinoza indigent the same day that it imposed $5,800 in LFOs. CP 531-532.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Espinoza's lengthy incarceration would have weighted heavily against a finding that he had the ability to pay LFOs.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

The court erred by ordering Mr. Espinoza to pay $5,800 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn2d at ---, 344 P.3d at 685. The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

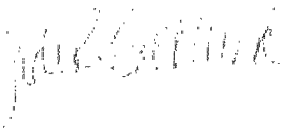
The court abused its discretion and violated Mr. Espinoza's rights to present a defense and to compulsory process by denying his motion to

sever so Hernandez could testify on his behalf. The state presented insufficient evidence to convict Mr. Espinoza under both the traditional analysis and the rule of *corpus delicti*. The drug dog sniff of Mr. Espinoza's car was no reliable enough to establish probable cause to search. The sniff also constituted an unlawful warrantless search that cannot provide the basis for the warrant. Mr. Espinoza's convictions must be reversed.

In the alternative, Mr. Espinoza's defense attorney provided ineffective assistance of counsel by failing to raise that his two convictions should have been scored as the same criminal conduct for sentencing purposes. The court also erred by ordering Mr. Espinoza to pay $5,800 in legal financial obligations without any inquiry into his means to do so. Mr. Espinoza's case must be remanded for resentencing.

Respectfully submitted on July 16, 2015,

BACKLUND AND MISTRY



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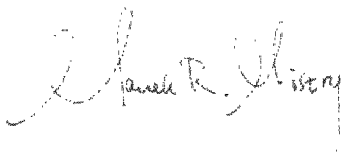

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 16, 2015.

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BACKLUND & MISTRY

July 16, 2015 - 9:22 AM

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